

Faculty Publications

2006

A Day in the Life of S. Breckinridge Tushingham

Erik M. Jensen

Case Western University School of Law, emj@case.edu

Follow this and additional works at: https://scholarlycommons.law.case.edu/faculty_publications

 Part of the [Legal Profession Commons](#)

Repository Citation

Jensen, Erik M., "A Day in the Life of S. Breckinridge Tushingham" (2006). *Faculty Publications*. 380.
https://scholarlycommons.law.case.edu/faculty_publications/380

This Article is brought to you for free and open access by Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

DENVER UNIVERSITY LAW REVIEW



ARTICLES

Holding Women's Psyches Hostage:
An Interpretative Analogy on the
Thomas/Hill Hearings *Penelope E. Bryan*

Judging the Future: How Social
Trends Will Affect the Courts *Lars Fuller*
and *Craig Boersema*

ESSAY

A Day in the Life of
S. Breckinridge Tushingham *Erik M. Jensen*

BOOK REVIEW

Faludi Fights Back: A Review of
BACKLASH: THE UNDECLARED WAR
AGAINST AMERICAN WOMEN *Merle H. Weiner*

COMMENTS

Dumping in the Mountains: Insurers
Pay Defense, Not Cleanup,
Costs in *Hecla Mining Co. v.*
New Hampshire Ins. Co. *Diana A. Cachey*

Warning: Denial of Fetal Protection
Under Title VII May Be Hazardous to
the Health of Industry and Society *Shirley A. Levy*

UNIVERSITY OF DENVER COLLEGE OF LAW

A DAY IN THE LIFE OF S. BRECKINRIDGE TUSHINGHAM

as recorded by ERIK M. JENSEN*

The law school building had been riddled with gunfire. Bodies lay in disarray, their arms and legs horribly distended. Hungry buzzards circled overhead.

While you catch your breath, let me assure you that the first paragraph has nothing to do with the rest of this work. The language, which would have made even Bulwer-Lytton gag, is a come-on. It does nothing more than alert you to the fictional nature of our journey and to my long-term goal: to be the Robert B. Parker of law reviews.

Law reviews have always printed a lot of fiction, hidden among the "with respect to's" and "take account of's."¹ But in the past, little of the stuff met FTC labelling standards. Now the pretense is gone. Everyone's telling stories, often short ones that must have been dashed off on a long weekend.²

If everybody else is getting away with emoting in legal journals and books—publishing fabricated life stories as scholarship³ and beefing up simple points with extended dialogue—hey! I want to jump on the bandwagon before the wheels fall off. I can "hear the call of stories" as well as anyone.⁴ (In fact, I hear one now.)

I haven't been to prison yet,⁵ but there ought to be a place for stories from WASPs with no arrest records, too. And I'm willing to drop an occasional footnote so that this will look sufficiently law-reviewish for the purists.⁶

My name is Samuel Breckinridge Tushingham, "Breck" for short. (It had to be something for short, and one of the alternatives was far

* Professor of Law, Case Western Reserve University, Cleveland, Ohio.

1. At *The New Yorker*, law review prose is valued for its elegance—further evidence of that once great journal's decline. See *Briefly Noted*, THE NEW YORKER, Oct. 21, 1991, at 134 (reviewing STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* (1991)) ("The author . . . writes like a law professor, constructing tight arguments whose precision offers aesthetic as well as intellectual pleasure.").

2. See Arthur Austin, *The Waste Land*, 1991 B.Y.U. L. REV. 1229, 1241 ("the new fad of storytelling was the newest scam in legal scholarship"). Naturally, the quoted line appears in a story.

3. Cf. AMANDA CROSS, *THE PLAYERS COME AGAIN* 228 (1990) ("It doesn't have to be the truth, just your vision of it, written down . . .").

4. See Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991).

5. See Mumia Abu-Jamal, *Teetering on the Brink: Between Life and Death*, 100 YALE L.J. 993 (1991) (essay by death row inmate); Joseph M. Giarratano, "To the Best of Our Knowledge, We Have Never Been Wrong": *Fallibility vs. Finality in Capital Punishment*, 100 YALE L.J. 1005 (1991) (essay by death row inmate).

6. See *supra* notes 1-5 and *infra* notes 7-34.

worse.)⁷ My bloodlines are good. Some of my ancestors came over on the Mayflower, heaving their guts out along the way. They could have formed chapters of Great-Great-Great-Grandfathers and grandmothers of the American Revolution, if only they'd had a better idea of what was to follow.

I was once a lawyer, and you know how that can be: Or, if you don't, consider yourself blessed. One 500-page set of lease documents too many became my designated driver, and I hit the road to drink. I was regularly crashing parties of the first, second and third parts, and my eyeballs glowed in the dark. My life, like my drinks, was on the rocks.

Therefore, be it resolved—like alcohol, some words get in the blood—I began to think of other pursuits. Why not law teaching? I know I'm supposed to care about the life of the mind and all that, and I would like to be a real academic—maybe a history professor or something—but that isn't going to happen.

Besides, law teaching has its special attractions. Law professors get paid real money; their take per hour approaches Michael Milken's. In addition, to salve their consciences, they can make contributions to the starving historians' fund.⁸

An academic job was attractive, too, because I remember my own law school teachers' lifestyle. I never understood how our tuition could be so high when the school had no overhead costs. Every office light seemed to be off by 3 p.m., and the electricity consumption on weekends wouldn't have powered Pin Point, Georgia, for a minute.

This is starting to sound as if I care only about money and free time, and that's not true. Another factor drew me to law teaching: law professors hate lawyers. Where else but in a law school could I be paid to do what I'd do for free: dump on the people I despise?

Anyway, I wanted a new job, so I went to the annual "meat market" run by the Association of American Law Schools. On two dreary November days in 1989, a Washington hotel was filled with law professors on expense accounts and us would-be academics paying our own expenses. I marched from interview room to interview room, drinking beer and acting as if I cared about the clinical programs and building projects at a zillion schools.

My wit and charm paid off. (What else could it have been? I'm a white male, remember, and I haven't yet disclosed any out-of-the-ordi-

7. Cf. *F.T.S. Assoc. v. Commissioner*, 58 T.C. 207 (1972), *acq.* 1972-2 C.B. 2 (collapsible corporation formed to develop and sell disposable toothbrush called "Tush").

8. Of course, law professors don't really make contributions (or do anything else high-minded, for that matter). But see *'What Did You Do During the 1960s, Daddy?'*, *NEWSDAY*, Sept. 4, 1988, Ideas section, at 3 (describing admission of Supreme Court nominee, Douglas Ginsberg, that he had smoked marijuana while a Harvard Law School professor). Just try getting them to agree that law school money should help support the history department. But a little hypocrisy is fine with me. I'm a believer in the suburban liberal principle that abstract whining is better than out-of-pocket cash flow any day.

nary sexual preferences.⁹) I was invited to visit half a dozen campuses for full day interviews. Scoff Law School was to be the first, and this is the record of my day there.¹⁰

The invitation from Scoff was welcome. I wanted to make sure that my first teaching job was at an institution good enough to satisfy my intellectual appetites. They weren't many—I was perfectly willing to go light on the heavy stuff—but I wanted *some* sustenance.

I had heard Scoff was an up-and-coming school. Yes, I heard it from the Scoff Law interviewing team, but I did hear it. And, you know, it's comforting to be at a place where everyone pats everyone else on the back, over and over. Almost every school in the country, except over-rated Yale, tells itself it's underrated: "If only the rest of the world knew how good we really are," etc., etc. You've heard it before.

So I gratefully accepted Dean Dean's invitation, and I arrived in underrated Scoff on a blustery January Thursday when the city was under a blanket of snow. I had wanted to come on a Friday, which would have fit better into my work schedule. But Professor Leyser, the chairthing of the apparently genderless Appointments Committee, pulled no punches: "You should get here before we close down for the weekend. Monday or Tuesday would be best, but definitely don't come on Friday."

Thursday it was to be.

The dean picked me up at 7:30 at the Scoff airport. As we drove to the campus, he chatted about the local sports successes and about the weather. (What would people talk about if there were no weather? What do people talk about in San Diego?) I started to doze off until we began sliding precariously close to one car after another. As I sweated in the subzero temperatures, the dean joked about "slippery slopes."

When we pulled safely into the dean's parking space, I gave a silent prayer, which I tried to make as consistent as possible with constitutional principles. Kissing the ground was out of the question. I needed my mouth that day, and I couldn't afford to leave it on the frozen surface.

The law school building was not quite as imposing as I had hoped, but bricks and mortar can't substitute for good people. I later learned that good people—or bad people—can't substitute for bricks and mortar, either, but that's another story.¹¹

Before my interviews began, the dean gave me a tour of the facility. He was trying to put the institution's best foot forward, and he wanted me to think that foot had never been touched by a loafer.

The cafeteria was one of the finer points in the building. "We try to

9. I'm thinking about it. How would anyone check? Hm-m-m-m, maybe I'd better think some more about this.

10. The names have been changed, but you know who you are. *But see infra* text accompanying note 34.

11. "Oh, good," I hear you say, "another one's in the works."

put our resources into those activities that generate the most student interest," the dean explained, "and we learned from a survey that students spend much more time eating than studying." The dean also told me, off the record,¹² that there used to be a separate faculty dining room, until the food fights got out of hand.

The cafeteria did have its pedagogical value—and not only because law is a seamless web, or a webless seam, or whatever. Among other things, it was used as a training ground for a course in restaurant law. Building on prior successes—desserts ranked tenth on the Gourman Report, and the pass rate on the salad bar exam was high—the dean hoped to develop an LL.M. program in the subject.

The dean was proud that the school's library had been compressed into one old classroom, with a storage closet serving as the "rare books room."¹³ "With everything on machines, we need terminals, not books," he said. "The book is as outmoded as chivalry. Happily,"—here he laughed—"we have neither."

I grinned weakly. When I expressed some hesitancy at cramming western thought into a microchip,¹⁴ the dean ridiculed my neanderthalish thinking. His jab to the ribs was gentle, but pointed: "Breck, I suppose you get some tactile pleasure from holding a book in your hands."

I do, of course. The Tushingshams raised me properly. Books are sacred. Do law professors read books?, I asked myself (and only myself).¹⁵ I continued to smile in what I hoped was a noncommittal way. I was trying to get a job offer, after all, and I kept thinking about those 500-page lease documents.

As the time approached 9:15, the dean walked me to my first interview. On the way to the faculty wing of the building, we passed the moot court room, where a trial practice class was meeting. It may have been my imagination, but I swear strains of *Swan Lake* were wafting down the corridor. The trial lawyers-to-be must have been practicing their pirouettes at the barre.¹⁶

We also passed by the law school conference room, where raucous laughter poured through the transom. The dean told me that the faculty's Committee on Harassment was meeting to consider the ethnic jokes heard in the hallways during the preceding week. The dean expected the committee to issue a strong statement condemning such reprehensible behavior.

Just as we reached the faculty offices, I saw a blur and felt a gust of

12. So sue me, Mr. Dean.

13. The "room" contained one dusty set of Coke's *Commentaries* and the publications of the Scoff faculty, which are, I learned later in the day, rare indeed.

14. Cf. JOHN MORTIMER, *RUMPOLE A LA CARTE* 101 (1990) ("The library [at Gunster University] was another concrete block. We went up in a lift to a floor which hummed with word processors and computers and even had shelves of books available.").

15. I now know the answer to that question: No.

16. Cf. JOHN MORTIMER, *RUMPOLE AND THE AGE OF MIRACLES* 72 (Penguin ed. 1988) ("I have always found a knowledge of the law to be a positive disadvantage in a barrister's life. . .").

wind. The dean laughed. "That's our newest faculty star, Professor Rush, a young scholar in Caribbean semiotics. We recruited him from Ottabia Law."

"Caribbean semiotics must be a fascinating subject," I replied, although I had no idea what a semiotic is and I could think of nothing Caribbean except Harry Belafonte. "I'd like to learn more about it," I added. "What has he written?"

"Well, nothing yet," replied the dean. "Great work can't be rushed, and we know he's working. You saw how fast he walked, Breck, and he was carrying a legal pad."

The pad was good recyclable white paper, too. The dean went on to explain his theory that the less a person has written, the more likely it is that the person has thought deeply about a subject. By that standard, Rush was an extremely thoughtful young man.

I must admit I wasn't convinced. I had recently read David Lodge's description of the once-promising Professor Masters.¹⁷ And I remembered my first sergeant in the army, who walked around with a clipboard. No one ever saw him do anything with it, but he always looked ready for business. He probably still does.

But I suppose I was being unfair with those impure thoughts. Who was I to question Professor Rush's efforts? I was an academic neophyte, unaware of all the pressures facing intellectuals—such as getting out of bed in the morning (or afternoon).¹⁸

Ideas take time to germinate, and Rush was still wet behind his academic ears.¹⁹ Ears dry slowly in the ivory tower climate. Rush had been teaching for only ten years, and during that decade he had only one sabbatical and a couple of research leaves. And summers are short, with all the yard work to do. The rest of the time Rush was burdened

17. '[Masters is] a great man, really, you know,' [Busby] said, with faint reproach.

'He is?' Morris [Zapp] panted.

'Well, he was. So I'm told. A brilliant young scholar before the war. Captured at Dunkirk, you know. One has to make allowances . . .'

'What has he published?'

'Nothing.'

'Nothing?'

'Nothing anybody's been able to discover. We had a student once, name of Boon, organized a bibliographical competition to find something [Masters] had published. Had students crawling all over the Library, but they drew a complete blank. Boon kept the prize.'

DAVID LODGE, *CHANGING PLACES* 89 (Penguin Books 1978) (1975).

18. Herbert Hoover was not always wrong: "I do not know of any other profession, or calling in the whole wide world where laziness and incapacity are wrapped up in the sacred garment of perpetual tenure." *Quoted in* Stuart Creighton Miller, 2 *ACAD. QUESTIONS*, 83, 85 (summer 1989) (reviewing GEORGE H. NASH, *HERBERT HOOVER AND STANFORD UNIVERSITY* (1988)). *See also* MICHAEL MALONE, *FOOLSCAP* 47 (1991):

Tenure was a choke hold whereby the faculty who grabbed it were never to be shaken loose unless so senile they couldn't locate their classrooms, or so depraved they debauched dogs in public. Short of those sins, the whole university had itself turned into one big sanctuary harboring the merely mad, the simply slothful, and the routinely immoral, ignorant, inept, obtuse, and inebriated.

19. Please excuse the mixed semaphores.

with classes; he had been left with only twenty or so hours per week to work on his multi-volume project.

I learned that the Scoff faculty was filled with scholars professing massive works-in-progress (hence the title "professor," I guess). The faculty's publication list for the prior year was short: Professor Dallas (about whom, more later) had several pieces in major reviews, and Professor Moot (ditto) had a couple of notes in the *Grazing Law Digest*. That was it. Nevertheless, one of these years, I'm sure, a publishing explosion will occur at Scoff. The Dead Sea Scrolls will be transcribed, too.²⁰

But I digress (or do I?). Before getting caught in Rush's academic cyclone, the dean and I had been on our way to my first interview. At about 9:30, the dean introduced me to Professor Chips.

I had assumed that few members of the Scoff faculty would be willing to admit to no work-in-progress, but Chips, a student of law and appliances,²¹ was refreshingly forthright: "Teaching is our *raison d'être*—pardon my French. Writing articles wastes time that could be devoted to our students and to writing memos."

Professor Chips's enthusiasm was catching; I had hopes for a vigorous discussion of legal education's faults and strengths. Unfortunately, shortly after my arrival, he looked at his watch and gasped: "We should talk about this at length, but I'm afraid I don't have time now. I must run to the grocery store and then clean the house. Errands are just all-consuming, you know; I barely have time for my sauna. I do hope we'll see each other again."

Chips's departure left me with free time before my next appointment. Looking for excitement—or what passes for excitement in academe—I wandered toward the placement office.

I found more than a little activity. Students were demonstrating against an employer that was interviewing on campus. The employer had refused to follow the school's guidelines urging that hiring decisions be made without regard to students' academic records. "Reject Ableism" read one sign;²² "Hire the Braindead" read another.

As I understood the students' position (and I confess I was unable to appreciate all the subtleties), thinking is Eurocentric, as well as male-centered.²³ I moved quickly past the demonstration, afraid that the stu-

20. Son of a gun. As I was writing this, it happened, sort of. See John Noble Wilford, *Monopoly Over Dead Sea Scrolls Is Ended*, N.Y. TIMES, Sept. 22, 1991, at 1, col. 3 (describing decision of Huntington Library to make available nearly complete set of photographs of scrolls).

21. Cf. JOHN KENNETH GALBRAITH, A TENURED PROFESSOR 50-51 (1990) (to avoid charges of "spread[ing] himself too thin," economics professor becomes world expert in refrigerator pricing).

22. See Smith College Office of Student Affairs, *Smith's New Guide for the Perplexed*, reprinted in 4 ACAD QUESTIONS 80, 81 (Spring 1991) ("ABLEISM:—oppression of the differently abled, by the temporarily able.").

23. See Perry Meisel, N.Y. TIMES, Aug. 5, 1990, § 7, at 25, col. 1 (reviewing SUSAN RUBIN SULEIMAN, *SUBVERSIVE INTENT: GENDER, POLITICS, AND THE AVANT-GARDE* (1990)) ("Feminist criticism, it appears, like feminist fiction, must be a kind of writing that refuses the straightforwardness of male writing, including its armory of values such as clarity, con-

dents might convince me on the merits.

At 10 o'clock, I climbed over piles of rubbish²⁴ to get into the office of Professor Oldham, student of Roman law, good food and fortified beverages—and a fine archeological specimen himself. Oldham fit the professorial role perfectly, rumpled and bursting at the seams.

Oldham's ample shirt showed a few dribbles of food, and it appeared to have once been very good food indeed. Wine spots also seemed to be vintage. "Uh-h-h-h, Breck, uh-h," Oldham began, "how was your—uh—trip—uh, uh—travel—uh, uh—junket—uh, uh—to Scoff?" My trip apparently reminded Oldham of some principle of canon law—it sounded to me like *lax lux lex et lox*²⁵—and he discoursed at some length on that subject.

By the time Oldham had uttered two or three other questions about legal matters, the hour was up, and we had barely reached the tenth century A.D. The spread of the Danelaw was not yet finished.

I wanted to stay; the aroma of last night's repast was intoxicating. But Professor Oldham was insistent: "You must—uh, uh—get on—uh—with your shed—uh-h-h—yule."

To be fair to Oldham, I should note that the delay was not entirely his fault. We were interrupted twice during the hour by Professor Bolt. "Lightning" Bolt, a member of the faculty building and grounds committee, was performing his institutional service by checking for burned out bulbs. No light was burned out, either time.

And we were also interrupted by a deeply tanned guy in shorts and sandals, who came in looking for a cigarette. Professor Hunque (pronounced "hoon-kay") had just returned from the Virgin Islands. "Hun-que's on sabbatical," Oldham informed me. (In the interests of conservation, I'll leave out the Oldhamic "uh's" this time.) "He's continuing his summer research on skin cancer, one of today's burning legal topics." Hunque and I briefly discussed the possibility of suing the Vatican for its failure to print warnings about the effects of sunshine.

At 11 a.m., I left as Oldham was filling in the "uh's" between "Good" and "by." I moved next door to the office of Professor Madonna, whose bookshelves were stocked with girly magazines from the past forty years. He was working on a pornography study, which he told

cision, and pointedness, all of which can be interpreted as masquerades for the male lust for power, replicating the structure of male sexual pleasure.").

24. One can learn a lot from piles in faculty offices, as Donald McCloskey has noted.

Waiting in Gershenkron's office for an interview one day a graduate student received from the nearest of numerous stacks of books and magazines a lesson in the scholarly life, the sort of lesson professors forget they give. The stack contained a book of plays in Greek, a book on non-Euclidean geometry, a book of chess problems, numerous statistical tomes, journals of literature and science, several historical works in various languages, and, at the bottom of it all, two feet deep, a well-worn copy of *Mad* magazine. Here was a scholar.

DONALD N. McCLOSKEY, *IF YOU'RE SO SMART: THE NARRATIVE OF ECONOMIC EXPERTISE* 75 (1990). Oldham's piles taught different lessons, however, most having to do with municipal health codes.

25. I think it means "lazy lighted law on a bagel."

me, is likely to conclude that pornography is a good thing for society and is, in any event, a lot of fun for readers like him.

Madonna and I talked a lot about constitutional law. Madonna's knowledge of the details of post-1985 cases was profound. I expressed my admiration for someone who had immersed himself in the Constitution.

"The Constitution?" he replied, with a puzzled look. "Oh, yes. I read that in high school."

"But, but . . ." I tried to interject a word in favor of the Founding Fathers, to no avail. In Madonna's universe, nothing important happened before 1950.

"Who cares about history?" thundered Madonna. "We have a living Constitution, and most life forms, after all, have no interest in their past. Do you think the polliwog gives a damn about James Madison, Breck? Of course not! Nor do I." The good professor²⁶ paused. "Now *Dolley* Madison is another matter," he added with a knowing wink.

I questioned Madonna about legal publication: how would he go about getting his pornography study into print? He was not clear on many journal practices, having last published something in 1971. But that fact did not prevent him from trashing law reviews: "Student editors don't know what they're doing; they can't understand the subtleties of my arguments. If I were to send them something, it would be way over their heads."

The hour ran out before I could learn how Madonna planned to deal with his law review difficulties. Actually, I suppose I had already found out his plans, just not the official version. In any event, I escaped. Madonna waved goodbye and pulled out a 1960s era *Penthouse* for closer study.

The appointments committee had arranged for me to visit a couple of classes during the day. At noon, I sat in on a professional responsibility session. The Scoff curriculum in professionalism was state-of-the-art, dealing with many questions that had previously been ignored in law school settings.

Because of Scoff's repudiation of the printed word, students had no reading assignments. Instead, they were required to watch *L.A. Law* and reruns of *Car 54, Where Are You?*, and to be prepared to discuss the ethical issues raised by each week's episodes.

This particular PR class considered an important, but understudied, issue—whether a lawyer should have sex with his or her clients.²⁷ Like any difficult question, this one seemed to have no clear answers. The

26. Cf. MAE WEST, GOODNESS HAD NOTHING TO DO WITH IT: THE AUTOBIOGRAPHY OF MAE WEST 156 (1959) (describing the movie, *Night After Night*, in which West responded to a hat check girl's exclamation—"Goodness, what beautiful diamonds!"—with the disclaimer, "Goodness had nothing to do with it, dearie."); see also Jack Mathews, *Movie Beginnings: First Came the Words*, L.A. TIMES, Dec. 1, 1987, § 6, at 7 (describing quote in more detail).

27. Study of the issue has been restricted to specialized areas of the law. See, e.g.,

students had obviously thought a great deal about sex, and their rapt expressions confirmed that they had brought their thinking caps to the classroom.

One student commented on the safety precautions that should be taken before lawyer-client sex. The instructor, Professor Reich, skillfully used those remarks to lead into a discussion of whether the lawyer, the client, or both have the responsibility to take protective measures.

Another student suggested that his participation in sex would depend on who the client is and on how many clients he has at the time. Still another pointed to the scheduling problems that could develop if some clients were singled out for special treatment: "I would refuse to keep my other clients waiting." Many raised questions about how time spent in sexual frolics should be billed.²⁸

The discussion turned to whether lawyers might have affirmative obligations to engage in sex. If the "duty of client contact" ever is accepted, I have no doubt that Scoff will be known as its birthplace. But this question, too, is fraught with conceptual (and contraceptive) difficulties. For example, one student pointed out the extraordinary physical demands that might be made on a lawyer prosecuting a class action.

The "dialogue," as we academics say, was robust. Student hands were in the air throughout the hour. (Given the subject matter, that was probably the safest place for them to be.) The session ended when one student took the opportunity, to Professor Reich's obvious pleasure, to comment on the repressive American regime of the 1980s.

If I smoked, I would have wanted a cigarette after that class. Completely drained by 1 p.m., I was taken to the student happy hour (really a "happy day") for lunch. One good thing about happy hours is that you don't leave them drained.

It turned out that some of my afternoon appointments had been canceled. "Well, as I told you, Thursday is a down day," Chairthing Leyser reminded me. A few faculty had been dragooned into staying to talk with me, but their mood was not pleasant, to say the least.

At about two, I swayed into an office where Professors Moot and Jeffries were waiting impatiently. I had done my homework about Scoff Law, and I knew the questions to ask to show my interest in the school—or so I thought. Reading ten years of Scoff alumni publications and plugging "Scoff" into Nexis should have counted for something.

Lawrence Dubin, *Sex and the Divorce Lawyer: Is the Client Off Limits?*, 1 GEO. J. LEGAL ETHICS 585 (1988).

28. See Kathy O'Malley & Dorothy Collin, *O'Malley & Collin Inc.*, CHI. TRIB., July 18, 1991, C28.

Attorney Albert B. Friedman got bad news recently: The Illinois Appellate Court ruled that a female client whose divorce he handled didn't have to pay his full \$15,500 bill because some of the time he billed her for was time the two of them spent having sex. . . . Attorney Albert B. Friedman got good news recently: He was appointed to the Illinois Supreme Court's Committee on Character and Fitness.

Query: If Mr. Friedman had engaged in group sexual activity, would he have billed several clients for the same time period?

I asked the two professors about the work of Scoff Professor Dallas, which I had read about in the *Wall Street Journal* and the *New York Times*. Dallas had developed a method to evaluate legal writings in terms of adverbial and adjectival density, and he was beginning to apply his analysis to the works of William Faulkner. Journalists were amazed, and amused, at Dallas's ingenuity.

"You must be proud to get that kind of exposure," I innocently suggested.

"Proud? It's an embarrassment to the school!" Moot roared. "What does this crap have to do with legal scholarship? Who cares what newspapers think, particularly about some southern cretin like Falconer? That idiot Dallas will probably start writing stories soon."

The temperature in the office had risen ten degrees. Moot continued: "Here! Look at this list of citations." He handed me a sheaf of papers with references to over 200 Wyoming court decisions in which his work on grazing law had been noted. "That represents real work."

"And you know what?" Moot wouldn't stop. "Dallas once *criticized* me for thinking like a lawyer! I consider that the highest compliment. Everything lawyers need to think about can be learned by studying grazing law. 'No more than 3.6 cows per acre may be grazed in Montana at elevations above 4,000 feet.' *That's* what law is all about."

I was impressed—I was embarrassed not to have boned up on Wyoming and Montana jurisprudence—but I expressed some surprise that a colleague's success could cause such a reaction. My remark was met with silence—a very loud silence.²⁹

We exchanged a few more unpleasantries for the rest of the allotted time. When I left the Moot-Jeffries office near three, the stale hallway air felt like a mountain breeze (with nothing grazing in the vicinity).

Except for the student happy hour, which was still going on, the building seemed empty at 3 p.m. I would have been lost if the dean had not arrived to thank me for coming and to escort me to another class, this one in feminist jurisprudence.

When I commented on the quiet, the dean mumbled that the faculty was hooked up at home to every conceivable electronic research device. Working at home is as easy as working at the school building, he emphasized, and without the distractions. Sleeping at home, I noted mentally, is even easier.

Ordinarily there wouldn't have been a class taught so late in the day so late in the week—three o'clock on a Thursday afternoon, for heaven's sake—but student enthusiasm for alternative legal analysis required fitting a course like feminist jurisprudence in somewhere. Professor Taylor, an untenured woman, had been brought in from "LaLa Law," one of the California law schools, to teach the course.

I asked the dean whether the school required that feminist jurispru-

29. See A.N. WILSON, C.S. LEWIS: A BIOGRAPHY 181 (1990) ("There is nothing like worldly success on the part of one academic to make all the others hate him or her.").

dence be taught by a woman. "Of course," replied the dean. "Could a man possibly understand the female way of thinking?"

I responded that many of my old army buddies had the same doubts, without realizing that their thoughts were to become the wave of the future.

The dean must have been a good ol' boy at heart. He pulled me aside for a confession: "Don't tell anyone I said this,³⁰ Breck, but the trusts and estates slots were already filled, and we are under pressure to hire more women. They have to teach *something*, and if they want their little ghetto, it makes things easier for the rest of us." Professor Taylor was the only woman faculty member I saw at Scoff.

"Well, here's classroom A; go to it, boy."

Quite a few nasty glances were directed my piggish way as I entered the classroom.

The class hour was devoted (probably not the right verb to use) to evaluating the effect of sexual activity on the separation thesis.³¹ What this seemed to mean was sex, sex, sex—and in graphic detail. I learned more about copulative verbs in that hour than I ever learned in high school English.

The name "Dworkin" was bandied about throughout the session. I hadn't realized old Ron had written on these topics,³² and I certainly didn't recognize the usual Dworkinian language.

The f-word has apparently become a term of art, and it has lost something in translation. When I was an undergraduate, prowling Boston's Combat Zone, I paid good money to hear women use words like that on stage. Now the words come with no extra charge, but they're buried in a lot of sociological bafflebab. (And who's this guy, Herman Newdics, that everyone talks about?) The material was certainly presented in a clearer, more straightforward fashion in the Combat Zone.

In classroom A, I felt alone. These folks did speak in a different voice, and I wasn't convinced it was deeper.

When I left the classroom, I was really all alone, except for the custodian, Jim Adam. Lacking the protection of tenure, he had to stay no matter what, even on a Thursday afternoon.

I had been abandoned by the faculty, and I needed to get to the airport. After we had chatted for a while, Adam volunteered to take me: "No one is here to even know I'm gone."

Adam, it turned out, is an occasional scholar himself, one of the

30. See *supra* note 12.

31. See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2-3 (1988) ("[w]omen are in some sense 'connected' to life and to other human beings during at least four recurrent and critical material experiences: the experience of pregnancy itself; the invasive and 'connecting' experience of heterosexual penetration . . . ; the monthly experience of menstruation . . . ; and the post-pregnancy experience of breast-feeding.").

32. I now know that he hasn't, at least not for public consumption. *Andrea Dworkin* has. See, e.g., ANDREA DWORKIN, *INTERCOURSE* (1987).

army of humanities majors doomed to academic unemployment. On the way to the airport, he told me about his frustrating life in the law school. He had kept library discards and had built a substantial collection in the school basement. "I love books," he said, "and it's good to have someone to talk to about books and other serious matters. I miss that at the law school."

Nice guy. I promised Adam that I would read any draft articles that he sent me. I'm happy to report that, except for his failure to integrate the rich literature on grazing theory, Adam's two most recent pieces are first-rate.

And so I left Scoff and the Scoff Law School, never to return. Although I did get an offer from Scoff, I took a job at one of the institutions I visited later.³³ I'd like to say that I made my decision based on some grand principle, but money was the tipping factor. Grand principles canceled each other out. The other schools turned out to be exactly the same as Scoff Law.³⁴

33. Therefore, I write from experience. Cf. Barbara Gamarekian, *Authors Muse on the Sense of Place*, N.Y. TIMES, Oct. 3, 1990, at C12 (quoting novelist-historian Shelby Foote: "[Faulkner] was a Southern writer because it was a place he grew up in and knew. Anything else would have required research, which was something he could not abide.").

34. See *supra* note 10.

THE WAYNE LAW REVIEW



TOUGH ON SCHOLARSHIP

as recorded by
ERIK M. JENSEN

Vol. 39, No. 3

Spring 1993

WAYNE STATE UNIVERSITY
DETROIT, MICHIGAN

TOUGH ON SCHOLARSHIP

as recorded by ERIK M. JENSEN†

My name is Breck, short for Samuel Breckinridge Tushingham, and I teach at the Sloth School of Law. I may be unknown to you,¹ but you've probably heard of the school. We plowed new ground when we became the first law school to have a gardening law clinic. And our faculty has sprouted several nationally known specialists (as well as a few budding superstars) in double-digging flower beds.²

There is mulch to be proud of at Sloth.³

As part of our attempt to renew the school's ecosystem⁴—pruning the deadwood among the senior faculty and depositing the remains on the compost heap⁵—we were in the market recently for new faculty members. A lot of stories are hidden away in academic hiring and promotion files—nothing wakes a faculty up

† Professor of Law, Case Western Reserve University. Christine A. Corcos and Helen B. Jensen made many helpful comments on an earlier draft; all the nasty stuff is theirs.

1. If so, you can correct that deficiency by reading my first set of reminiscences. See *A Day in the Life of S. Breckinridge Tushingham*, 69 DENV. U. L. REV. 231 (1992) (recorded by Erik M. Jensen) (describing day of interviews at Scoff Law School) [hereinafter *A Day*].

2. See, e.g., Rupert P. Cadwalleder, *A Blistering Attack on Callousness in American Gardening Law*, 62 LAWN & GARD. L. REV. 633 (1989); see also Katherine Kudzu, *Plant Parenthood and Feminist Theory*, 13 J. PLANT REPRO. 614 (1986).

Flower beds should be distinguished from beds of Flowers. See *My 12-Year Affair with Bill Clinton*, THE STAR, Feb. 4, 1992, at 24 (story of Gennifer Flowers). But the Sloth faculty is known as a hot bed of research in this latter area as well. Yes, one commentator has condemned "shirkers," who, "[e]xploiting the shield of tenure, . . . use the law school as a mail drop while they play with computers, visit obscure parts of the world, or dabble in seducing students." Arthur D. Austin, *The Custom of "Vetting" as a Substitute for Peer Review*, 32 ARIZ. L. REV. 1, 2 n.9 (1990). Professor Austin notwithstanding, my more rakish colleagues object to being called mere "dabblers," and others get very little mail.

3. This footnote exists solely for purposes of cross-reference, which is more of a justification for existence than most footnotes can claim.

4. Whether or not this journal is published on recycled paper, it contains a lot of recycled ideas.

5. Yep, another footnote for cross-reference purposes. See *supra* note 3.

faster from hibernation than a good, bloody personnel fight⁶—and I thought you guys might be interested in hearing one of them.⁷

The best way to beef up⁸ a faculty quickly is through lateral hires. Entry level people, those straight from practice—or, worse, straight from law school⁹—are risky. They may be adroit in the classroom, making the rest of us look bad, and they may write a lot of good stuff, making the rest of us *very* nervous.

Sure, we can often get rid of embarrassingly productive untenured folks. It's easy to conclude that a candidate's work doesn't meet our high standards for promotion.¹⁰ And the standards don't have to bear any relationship to the qualifications of the already tenured faculty, where breathing is the primary requirement for continued compensation.¹¹

But why take a chance that the university administration might overrule us, and stick us with someone who is bright and really works hard?

6. Some of the words in that clause may be redundant. Mention the word "personnel" in academic circles, and listeners will assume that (1) a fight is involved, and (2) it is—or will be—bloody.

7. [Recorder's note: Before libel suits commence, let me emphasize that this is a *story*, a creation of my fertile mind, enhanced by the gardening experience at Sloth. Cf. NORMAN F. CANTOR, *INVENTING THE MIDDLE AGES* 209 (1991) (quoting J. R. R. Tolkien on fantasy writing: "One writes such a story not out of the leaves of trees still to be observed, not by means of botany and soil-science; but it grows like a seed in the dark out of the leaf-mold of the mind; out of all that has been thought or seen or read, that has long been forgotten, descending into the deeps."). Frodo lives! Breck lives!

And those of you worried about getting caught reading this memoir should relax. Prop this *Review* up on your desk. Everyone will think you're perusing the piece on *Equitable Easements*, *Symbiotic Jurisprudence*, and *Hannibal's March to the Sea*—or something similar. Should someone walk past your office, just look as if you're deep in thought.]

8. At Sloth, with our vegetarian leanings, we are inclined to "soybean up" or "tofu up" the faculty.

9. Or still worse, straight from some Ph.D. program in subterranean anthropologic sociometrics.

10. Corollary: It's easy to conclude that any candidate's work *does* meet the high standards, if that's what you want. See *infra* note 58 and accompanying text; see also the faculty list at your own law school.

11. When we talk about the "breath" of someone's scholarship, we mean it. Even with that standard, we have some close cases.

Safety is the name of the game,¹² and with experienced people, we know what we're getting. We can go after those with the right combination of pedagogical ineptness and publication malaise. In short, we can try to buy "players" away from other schools.¹³

Sloth has the economic weapons to be a major buyer in the academic job market. Our salaries are more than competitive¹⁴ and, though they need a little repair, the accommodations are state of the art. We provide a large percentage of our faculty with chairs.¹⁵ And what other law school has a faculty hot tub?¹⁶

The work load is right, too. Several years ago, when the university offered faculty contracts stipulating a 24-hour work week, including all preparation and committee time, my colleagues successfully fought the proposal. There was no way, they said, that the university should be permitted to increase faculty work obligations.

Don't get the wrong idea; we aren't mindlessly goofing off. Our leisurely work styles are grounded in theory.¹⁷ For one thing, academic freedom protects those doing nothing and, except for a few crazies,¹⁸ who wants to attack academic freedom? For another,

12. Cf. A. N. WILSON, C. S. LEWIS: A BIOGRAPHY 208 (1990):

There would have been no chance of [Lewis's] being elected to the Merton Chair even though *The Allegory of Love* and *A Preface to 'Paradise Lost'* . . . were far more interesting and distinguished than anything which his rivals for the job had produced. They, however, were safe men, worthy dullards: and that is usually the sort of man that dons will promote.

13. A "player" is someone who we pretend has a national reputation. For example, Professor Slugg (pronounced "Sl-ooooo-g"), who published one piece for tenure in 1968 and has hardly awakened since, is called a "player" at Sloth.

14. That was not always true, a colleague informs me. Sloth's salaries were very low until a new dean arrived about a decade ago. He promised to invigorate the school by heightening standards and raising salaries. He did the latter, the faculty resisted the former, and we're left with lots of cash, still another dean, and no obligations.

15. Easy chairs, of course.

16. Yes, sir, another cross-reference footnote. See *supra* notes 3 and 5.

17. Cf. Leszek Kolakowski, *The General Theory of Not-Gardening: A Major Contribution to Social Anthropology, Ontology Moral Philosophy, Psychology, Sociology, Political Theory, and Many Other Fields of Scientific Investigation*, in MODERNITY ON ENDLESS TRIAL 240, 240 (1990) ("Those who hate gardening need a theory. Not to garden without a theory is a shallow, unworthy way of life. . . . The alternative to not-gardening without a theory is to garden. However, it is much easier to have a theory than actually to garden.").

18. See, e.g., MARTIN ANDERSON, IMPOSTORS IN THE TEMPLE (1992); CHARLES J. SYKES, PROFSCAM: PROFESSORS AND THE DEMISE OF HIGHER EDUCATION (1988).

if we could wake Professor Winkle, he would tell you that "[s]leep is first amendment activity."¹⁹ And Adam Smith knew that academic rest makes perfect economic sense.²⁰

To top it all off, the city of Sloth is a pleasant place to exist. The winters are mild, and the culture abundant. The Sloth Philharmonic provides just the right combination of soothing sounds—they're doing a Mantovani cycle this year—and the Sloth Museum of Art has one of the world's best collections of toothpick sculptures.²¹ Everyone likes the life in (and of) Sloth.²²

Who could resist us?

We decided last year to concentrate our raiding on the Scoff Law School, which I have written about in another journal.²³ Sloth competes for students with Scoff, and we often lose the competition. Notwithstanding that embarrassing fact, and regardless of what *U.S. News and World Report* thinks,²⁴ we consider ourselves to be the vastly superior school.²⁵ We thought we'd be able to milk the publicity for years if only we could pull one or more established people away from the Scoffers.

Scoff had a lot of attractive possibilities on its faculty—attractive, that is, if you don't mind white males.

19. Richard V. Winkle, *Sleep and the Constitution*, 3 LAW & LEISURE REV. 63, 64 (1951); see also *id.* at 67 ("Just as the amendment protects free exercise, it protects the lack thereof."); cf. *Clark v. Community for Creative Non-violence*, 468 U.S. 288, 293 (1984).

20. See ADAM SMITH, *THE WEALTH OF NATIONS* 718 (Edwin Cannan ed., Modern Library 1937) (1776):

If the authority to which he is subject resides in the body corporate, the college, or university, of which he himself is a member, and in which the greater part of the other members are, like himself, persons who either are, or ought to be teachers; they are likely to make a common cause, to be all very indulgent to one another, and every man to consent that his neighbour may neglect his duty, provided he himself is allowed to neglect his own. In the university of Oxford, the greater part of the public professors have, for these many years, given up altogether even the pretence of teaching.

21. Venus de Milo made from toothpicks is an astonishing, even disarming, sight. And if one of your children bumps a sculpture, it converts to an entertaining game of pick up sticks.

22. Potential students (our student body is made up of "potential students") seem to have found our advertising slogan ("Join in the intellectual life of Sloth") attractive.

23. See *A Day*, *supra* note 1.

24. The *U.S.N.W.R.* dipstick shows us to be about a quartile low.

25. See *A Day*, *supra* note 1, at 233 ("Almost every school in the country, except overrated Yale, tells itself it's underrated: 'If only the rest of the world knew how good we really are,' etc., etc.').

I don't mind white males. I'm one myself.²⁶ But in the academic hiring world, the phrase "white male" has become the equivalent of "unclean, unclean!" I don't understand how we got to this point—white males can be just as lethargic, and therefore just as suitable for academic life, as anyone else—but get there we did.

Anyway, because we were trying to beat up on Scoff and its nearly all-male faculty, our university administration granted us an indulgence, permitting us to hire another white male or two.²⁷ With that directive in hand, we decided to go after Scoff with a vengeance.

We directed our firepower at three Scoff stars—Bolt, Rush, and Dallas—whom you may already know.²⁸ We hoped to be able to get at least one of them to move.²⁹

Some members of our faculty wanted to hire Professor Benjamin "Lightning" Bolt. Bolt, many thought, was just the man to get our school's maintenance program under control. Befitting our status as a center of academic gardening, we've managed to keep the law school grounds up fairly well.³⁰ But parts of the building need work.

Bolt had developed a national reputation in academic maintenance. He had written a 30-page memorandum on the theory of

26. I'm sorry, but I can't help it: they're immutable characteristics. *But see* CHRISTINE JORGENSEN, *CHRISTINE JORGENSEN: A PERSONAL AUTOBIOGRAPHY* (1967) (making the immutable mutable); RENEE RICHARDS, *SECOND SERVE: THE RENEE RICHARDS STORY* (1983) (ditto).

Jorgensen's concept of a "personal" autobiography is interesting. I suppose the adjective distinguishes her work from some modern competition. *See* Richard Sandomir, *Turning a Celebrity's Story into a Salable Book*, N.Y. TIMES, Mar. 23, 1992, at C18 (describing basketball star Charles Barkley, who claimed he was misquoted in his own autobiography, and baseball legend Darryl Strawberry, who similarly forgot what he had "written").

27. The provost did urge us to find men with unisex names, if possible. A Leslie or a Lynn would have been perfect.

28. *See A Day*, *supra* note 1, at 237 (Bolt), 234-36 (Rush) & 240 (Dallas). We would also have been interested in Moot, the foremost grazing law scholar in the country, *see id.* at 239-40, but he was too firmly rooted to be moveable. He had signed a contract to do a treatise, *Moot on Grazing*, that should dominate the field (and pastures) in Scoff.

29. Of course, we've unsuccessfully tried to get movement out of a lot of long-time Slothians, too.

30. Student independent "research" projects, you know, provide a way for the institution to get cheap labor. Mowing exercises, "The Cutting Edge of the Law," earn two credits. Weeding comes under "Lawn Order," and can be from one to sixteen credits, at the discretion of the instructor. Some students, who "weed 'em and reap," are paid research assistants.

law school trash pickup³¹ that had been passed around at innumerable law school conventions.

When Bolt visited Sloth for interviews, he presented a faculty workshop on brickwork³² and carpentry. (What better subjects for a workshop?) Bolt is a strict constructionist, and many of his comments hit the nail squarely on the head. With him on board, we could tighten the screws on much of our wrongfully attached woodwork.

Bolt has an intuitive sense of appropriate law school decor. Immediately after entering our building, he noted some problems with the portraits adorning our walls.³³ He saw, for example, that the pictures were poorly matted. As he put it, "I have no idea what the intentions of the framers were."

Bolt had his supporters, but other members of the faculty wanted to broaden our horizons by going after the Scoff expert in Caribbean semiotics, Professor N. A. Rush. To compete in today's lawless academic legal world, a school needs curricular exoticism far more than it needs coherence.³⁴

When Rush visited Sloth, he gave a workshop on—well, I wasn't sure what most of it was about.³⁵ It dealt, I think, with his work-in-progress, which had been progressing for at least a decade.

Rush did talk fast, and he admitted that much was to be done before his project would be complete. (None of Rush's non-speaking work seems to be a rush job.) One of the few parts of his presentation that I could understand was a complaint about

31. Cf. DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* 79 (1983) (discussing desirability of paying law firm janitors the same as law school professors); see also Meg Cox, *Henceforth, 'Sanitation Engineers' Are to Be Known as 'Art Collectors'*, WALL ST. J., Nov. 22, 1988, § 2, at 1 (describing artist whose medium is trash: "When he isn't recycling his own rubbish in clear plastic cubes as self-portraits, he's out picking up his art supplies from dumpsters and trash cans.").

32. When Bolt dons a mortarboard at graduations, he knows whereof he wears.

33. Bolt is a fine judge of hanging.

34. Cf. *United States v. Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars in United States Currency*, 955 F.2d 712, 722 (D.C. Cir. 1992) (Silberman, J., concurring) ("[M]any of our law reviews are dominated by rather exotic offerings of increasingly out-of-touch faculty members. . . ."); MICHAEL MALONE, *FOOLSCAP* 298 (1991) ("[T]hat faction might try an end-run with those tenure slots, go for some radical feminist or psychoanalytic theorist or specialist in Native American folktales and drive-in horror movies.").

35. Actually, it was about an hour.

the lack of government funding for innovative legal scholarship—work like his own. The Eurocentric emphasis on literacy is a product of our benighted past, he stressed, and the feds don't recognize "performance scholarship" for the invaluable contribution it could become.³⁶

When it came to political analysis—and his workshop got there very fast—Rush did not beat around the Bush; he mounted a frontal attack. It was the sort of dispassionate, disinterested commentary that we all love in legal academia. God doesn't exist, of course, but if He did, He'd be a liberal Democrat.

And if only Rush weren't a white male, he'd be perfect to fill one of our diversity slots.³⁷

Rush, too, had his Slothful proponents, but still other Sloth faculty leaned toward Professor Dallas. Dallas has published quite a bit and, as a result, has attracted a great deal of public attention.

Much of Dallas's work is peculiar, however—like deconstructing parking law³⁸—and some readers find the Dallas oeuvre to be

36. See Erik M. Jensen, *Performance Scholarship and the Internal Revenue Code*, 29 Hous. L. Rev. 429 (1992) (describing performance scholarship as a replacement for actually having to write something down).

In support of his position, Rush described a belly dancer who had quite innocently, and unsuccessfully, applied to the Office of Naval Research for a grant. Rush complained about what he saw as ONR's purposely misleading name. I was reminded of Richard Nixon, when he decried the similarity in pronunciation of "Du Bois Clubs," which had been designated as a Communist front organization, and the Boys Clubs of America. It was, he said, "an almost classic example of Communist deception and duplicity." N.Y. TIMES, Mar. 9, 1966, quoted in STEPHEN E. AMBROSE, *NIXON: THE TRIUMPH OF A POLITICIAN 1962-1972*, 81-82 (1989).

37. The official goal of "diversity" permits us to search for faculty candidates who think like everyone already on the faculty. See David P. Bryden, *It Ain't What They Teach, It's The Way That They Teach It*, PUB. INTEREST, Spring 1991, 38, 48 ("One of [affirmative action's] effects is to tighten the left's hold on the universities. It's not just that minorities are, on average, more liberal than whites: affirmative action encourages them to become even more liberal . . . than they were before."). We can pretend we're using principles more important than merit—and we can act very self-righteous about the whole thing—while we maintain the ideological conformity that helps make academia so relaxing. Cf. P. J. O'ROURKE, *GIVE WAR A CHANCE* 123 (1992) ("Academia . . . is a veritable compost heap of Bolshie brain mulch."); text accompanying notes 3 & 5.

38. See Dietrich Dallas, *The Parking Meter as Agent of Social Oppression: Why Society Values Meter Men More Than Meter Maids*, 73 PARKING & Soc'Y 167 (1988); see also Underhill Moore & Charles C. Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L.J. 1 (1943) (monumental study—really—of effect of law on parking patterns in New Haven, Connecticut; unanswered question: Why would anyone want to park in New Haven under any

written in an angry style.³⁹ Moreover, he's inexcusably begun to publish cartoons in law reviews, aiming some of his work at the MTV generation.

"This is nothing new. We've been engaged in line drawing for years," Dallas responds, generally without success, to the criticisms of his artwork.

I must admit I enjoyed my conversation with Dallas, whom I had missed during my visit to Sloth several years ago. But I had little doubt that he was not for Sloth.

Among other things, Dallas has this strange goal of publishing in all fifty states before he dies.⁴⁰ When he told me that, alarm bells went off. Dallas is spreading himself too thin, something we don't tolerate at Sloth. He should be concentrating on the big work-in-progress, like a monster book,⁴¹ article, or performance.⁴²

I was not the only one who reacted negatively to Dallas. Dallas's workshop set even his supporters' teeth on edge. He made some comments that challenged the legal-academic lifestyle, and no subject could have immersed him in hotter water at Sloth.⁴³

After all three candidates had visited us, the Sloth Law appointments committee convened to put together a recommendation for the full faculty.⁴⁴ I'm on the committee, but I usually play a secondary role. The most outspoken committee member is Professor Gabrielle "Gabby" Hayes.

My friend Gabby is one of the strongest proponents of scholarship on the faculty. She can tear up other people's work with the best of them,⁴⁵ and occasionally she reads it first. Nothing, it

circumstances?); Frank Lee Wong, *Why Dudley and Stephens Should Have Had Training in Parking Architecture*, 33 PARKING ARCH. DIG. 666 (1968) (parking architects know how to draw lots). Deconstructing parking law should be distinguished from demolishing parking garages. Well, maybe not.

39. The style is, however, accessible—a fatal flaw in an academic. See Erik M. Jensen, *Law Review Correspondence: Better Read Than Dead?*, 24 CONN. L. REV. 159, 166 (1991) ("impenetrable prose is presumed to contain profound insights"); see also Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926 (1990).

40. From what I understand about Dallas's relationship with his present colleagues, he might have very little time left.

41. I mean a *big* book, not something like *Godzilla and the Law*.

42. Or publishing lots of ditties in local bar journals. Or catching a few z's. Or running a few errands.

43. Not counting hot tub activities, of course. See *supra* text accompanying note 16.

44. The faculty meeting would be right after lunch.

45. She had practiced on the Manhattan telephone book.

seems, measures up to the quality of her own most recent scholarship.⁴⁶

Now, I have been, by law school standards,⁴⁷ a reasonably productive scholar. I published a couple of pieces in the alumni magazine (*How I Spent My Summer* and *Organize Your Bookcase for Scholarship*). And I write a column for the newsletter of the American Society of Law and Gardening. On the basis of that output, and a proposed multi-volume treatise on the Sloth law of roofs,⁴⁸ I was promoted to full professor, with tenure, after only two years on the faculty.

So I do think scholarship is important, and no one should ever suggest that I don't value the life of the mind.⁴⁹ But let's not go overboard⁵⁰ on that sort of thing. Oh, I suppose my views have matured a bit since I was granted tenure.⁵¹ I used to think the grand article was the be-all and end-all of academic life, but my Slothful colleagues convinced me that youthful enthusiasm can go only so far. I needed to chill out.

And I did. Why shouldn't I slow down now that I have the academic union card? Five-hour days are killers! Who needs sap and ketchup flowing anyway?⁵²

46. See Gabrielle Hayes, *A Theory with Respect to Counterintuitive Econometrics to Take Account of Daylight, Bipedes, Imbecility, State Action, Sacrifice Flies, and the Law*, 22 U.S.N.D. AT HOOPLE L. REV. 221 (1974).

47. See Jonathan L. Entin, *The Law Professor as Advocate*, 38 CASE W. RES. L. REV. 512, 532 (1988) ("publication requirements for law professors generally are strikingly modest compared to the standards applicable to faculty in most other disciplines," citing Bruce Ackerman, *The Marketplace of Ideas*, 90 YALE L.J. 1131, 1133, 1135-36, 1141-44 (1981)).

48. Completion of *Tushingham on Roofs* has been delayed because I got a bad case of shingles and ran out of money, making it temporarily impossible to meet overhead costs.

49. As former Vice President Quayle so eloquently put it in his speech to the United Negro College Fund, "[W]hat a waste it is to lose one's mind or not to have a mind is being very wasteful. How true that is." Maureen Dowd, *The Education of Dan Quayle*, N.Y. TIMES, June 25, 1989, § 6 (magazine), at 18, 20.

50. See *infra* text accompanying note 53.

51. Some thought I viewed the scholarly record of Scoff Law School with disdain in *A Day*. See *supra* note 1. I plead not guilty. (But so did Mike Tyson, Leona Helmsley, and Manuel Noriega.)

52.

With tenure hath only the mediocre
a sinecure unto death. Unto death, I say!

WITH TENURE

Nature is constipated the sap doesn't flow

If you do too much too soon, there's no room for growth, and growth is very important at an institution known for its gardening programs.

At the critical appointments committee meeting Gabby wore a "Tough on Scholarship" sweatshirt, which portrayed a gowned and blindfolded scholar plunging from the gangplank of the U.S.S. Academe.⁵³ A line of other figures, all also white males, waited to take the same leap into oblivion. The only lifeboat in sight, as far as I could tell,⁵⁴ contained a figure brandishing a harpoon.

The discussion of Dallas was short and to the point—of that harpoon. Everyone had problems with his work. There was so much of it. It was wide-ranging, interesting, and well-written (some of us thought) but—well—not up to our standards.⁵⁵

"Anyone who doesn't aspire to publish regularly in top law reviews is fully incapacitated bovine flesh!"⁵⁶ Gabby roared. "*Duke, Columbia, Virginia, Vanderbilt?! Crap reviews!*"⁵⁷ And the man doesn't use a single 'with respect to' or 'take account of' in most of his articles. How can anyone do topnotch legal work without using the profession's terms of art?"

Some members of the committee found the ferocity of Gabby's outburst surprising, I suspect, because she last published something in 1974, when she was up for tenure. And the journal was not exactly *Harvard*.⁵⁸ But we all recognize Hayes's superstardom, and

With tenure the classroom is empty

et in academia ego

the ketchup is stuck inside the bottle

the letter goes unanswered the bell doesn't ring.

David Lehman, *With Tenure*, in *OPERATION MEMORY* 51-52 (1990).

53. Oh, no. I Kidd you not: scholars are now saying that pirates did not use gangplanks, and that some were even cross-dressers. See Tony Horwitz, *Scholars Plunder Myths About Pirates, and It's Such a Drag*, *WALL ST. J.*, Apr. 23, 1992, at A1.

54. You'll understand, I hope, why it was inappropriate for me to study the sweatshirt any more closely.

55. See *supra* note 10 and accompanying text.

56. That's "dead meat" to those of you not fluent in legal jargon.

57. The language used here was an atypical retreat from Gabby's usual precise, academic vocabulary. Cf. *supra* text accompanying note 56. She was quite emotionally involved with the evaluation of Dallas's work, and her language suffered as a result.

58. See *supra* note 46. We have heard about several major projects in the meantime, but all have apparently bitten the dust before publication.

No one is sure why the dust has gotten involved. Gabby may believe in publication standards so tough that no one, including Gabby herself, can meet

no one was enthusiastic enough about Dallas to take up the fight on his behalf. I certainly wasn't.

Rush fared better.

Gabby raved about him: "The guy's a genius. His written work is beyond criticism." Not all white males are beyond redemption, I'm glad to say.

Professor Heep noted hesitantly: "Well, he hasn't really written anything."

Hayes: "That's it precisely. The promise, the potential, is there. He has published in no second-rate journals, and no one has disparaged his work in print. What more could anyone ask?"

Heep meekly replied: "But he hasn't really done any work that we can evaluate."

Hayes: "Yes, exactly. I'm glad you agree."

It is indeed hard to measure the quality of theoretical work—work that exists only in theory. But even had Rush actually put pen to paper, or fingers to keyboard, how could any of us have evaluated a scholar in a unique field? In such a case, we had to defer to the experts like Gabby.⁵⁹

If we could have made offers to two people, most seemed to think that Rush should get one of them. Many of us said nothing about Rush, however, because we were marshalling our forces on behalf of Bolt, our first choice.

I began the discussion of Bolt with what I hoped was a winning position: "We've been having a lot of difficulty with the urinals in the building. Bolt is just the man to deal with that issue, and I am particularly well-disposed to him."

After my opening salvo, the committee engaged in a lengthy debate about men's and women's restrooms, much of it not suitable for reproduction in a family publication. Happily, that's not what

them. Cf. *id.* and accompanying text. Under that theory, Gabby's non-publication is conclusive evidence of her service to the cause of scholarship.

Whatever the reason, Gabby's list of publications undoubtedly suffers from anorexia. She has, however, jokingly promised to review a book as soon as she reads one.

59. Cf. MALONE, *supra* note 34, at 47-48 ("Craziness like departments . . . calling themselves 'Native American Studies' and hiring boozed-out half-breeds from Boone . . . to hop up and down howling (*so they claimed*) authentic Algonquin into tape recorders.") (emphasis added).

this rag—er, *Review*—is.⁶⁰ A specimen therefore follows:

Professor Harp: "All you men ever think about is urination."⁶¹

Professor Ding: "It's the only output we get around here. We have become a peer institution all by ourselves."

Professor Traub (a constitutional law type) mumbled something about streams of commerce.

Professor Green, an environmentalist: "We should have fewer receptacles for everyone—male, female, and others. Otherwise, it just encourages them."

Professor Donner spoke with the benefit of his labor law background: "What if we get Bolt here to do this stuff, and Lightning strikes?"

And so on.

Despite these comments, the committee was overwhelmingly positive about Bolt. Some members noted how wonderful it was that Bolt's work had sparked a spirited academic debate. If the budget permitted, Bolt and Rush were clearly shoe-ins.

Alas. After the lines had been drawn and, we thought, erased, Dean Deluca came to tell us that he had added up the numbers again. We could afford only one addition to the faculty for the next year.

A financial shortage complicated matters considerably. None of the untenured folks was up for promotion, and we therefore didn't have the option of blowing one of them away to free up a little cash. We had to decide between Bolt and Rush.

Our faculty doesn't divide into different schools of thought.⁶² That would require effort and, yes, thought. No, our battles are

60. For those who question the relevance of this issue to scholarship, see Tony Horwitz, *Endangered Feces: Paleo-Scatologist Plumbs Old Privies*, WALL ST. J., Sept. 9, 1991, at A1 (describing new archeological field of "paleo-scatology," studying such artifacts as the "Lloyds Bank T*rd," deposited 1,000 years ago by a Viking who must have been upset at the slow-moving line).

For most of us, excrement research is not a field of dreams. *But see* SIGMUND FREUD, *THE INTERPRETATION OF DREAMS* 367-68 (James Strachey trans.; Avon Books ed., 1965) ("A dreamer remarked that at one point 'the dream had been wiped away'; and the analysis led to an infantile recollection of his listening to someone wiping himself after. . . ."—well, you know the rest).

"Oh, s***!", I hear you say, and you are right. It is nice to think of a discipline in which "Your work is a crock" may be regarded as a compliment. Imagine one scholar (of Italian descent?) making his research materials available to another: "I'll make you an offer of a can of refuse."

61. Cf. Taunya Lovell Banks, *Toilets as a Feminist Issue: A True Story*, 6 BERKELEY WOMEN'S L.J. 263 (1990-91).

62. Duke, for example, has its school of Fish. In this area—and probably only in this area—Harvard operates on a smaller scale, having only a single Minow.

usually more sharply defined, between those, like Hayes and me, who are tough on scholarship and those who would permit the trivial work engaged in by Dallas and his clones.

But this was a more confusing battle because the toughies were themselves divided.

With only one offer to be made, there seemed to be no room for compromise between the Rush supporters and the Bolt people. Perhaps that was just as well. The doctrine of "You scratch my back and I'll scratch yours" is no longer operative in a post-Clarence Thomas-Anita Hill world.

With catastrophe facing us, Gabby saved the day with a gracious concession speech: "I am convinced that Bolt can become a scholar with respect to who (or is it 'whom'?—oh, I don't know) we will be proud. We will continue to be tough on scholarship at Sloth!" As she said this, she pointed to her sweatshirt.⁶³ "To take account of the interests of collegiality, let us all rally around Benjamin Bolt."

Whew! This was a great victory for those who want to be tough on scholarship. And we have every hope that we'll be able to afford Rush as well in a year or two. Double tough. I know how happy these events made me; at all costs I wanted to avoid a blood and guts battle. What's more, I'm sure I detected a look of relief on Gabby's face, too, as she left the meeting to return to her own works-in-progress.

63. While I modestly averted my eyes. *See supra* note 54.



Articles

Dean Breck

as recorded by Erik M. Jensen

COPYRIGHT © 1999 THE GREEN BAG, INC.

THE GREEN BAG
AN ENTERTAINING JOURNAL OF LAW

2D SERIES • VOL. 2

No. 4 • SUMMER 1999

Dean Breck

as recorded by Erik M. Jensen

MEMORANDUM

SIWASH SCHOOL OF LAW

TO: Faculty Minus One
FROM: Reginald Cuthbert, Cheesesticks Professor of Law
RE: Tushingham's Antics
DATE: April 2, 1994

The S.O.B. has written another story!

Several of us were horrified when a "colleague," Professor Tushingham, published a story – with footnotes yet! – that denigrated the legal-academic profession. He's done it again. A little criticism is all in good fun, but his last "story" is beyond the pail. (I put it behind the slop bucket in the barn.)

It's about a hiring dispute at a "fictional" law school. The school's goal is diversity – more minorities and women – although a few old geezers hold out for merit hiring, and a few others think diversity of views should matter. And then the school winds up hiring a white male anyway, apparently because he's lazy enough not to threaten anybody.

No one should think that the fictional – and stupidly named – "Sloth" law school is anything like our school. But Tushingham uses our names in his sophomoric work. Some people out there might not be able to distinguish between Tushingham's rantings and the true Siwash.

We have to do something.

cc: Staff and Students

Editor's note: Professor Cuthbert is presumably referring to *A Day in the Life of S. Breckinridge Tushingham*, 69 DENV. U. L. REV. 231 (1992) (as recorded by Erik M. Jensen).

This must refer to *Tough on Scholarship*, 39 WAYNE L. REV. 1285 (1993) (as recorded by Erik M. Jensen).

I'M THE PROFESSOR TUSHINGHAM mentioned in the memo, but let's not get hung up on formalities. To my Siwash friends (both of them), I'm Breck, short for Samuel Breckinridge Tushingham.

If you haven't heard of me, you haven't been

keeping up with the literature. I'm a rising star in the legal firmament, and, believe it or not, I'm really not a bad guy. But I knew my days at Siwash were numbered¹ when I received a pirated copy, marked with a black spot, of Cuthbert's memo.

Erik M. Jensen is the David L. Brennan Professor of Law at Case Western Reserve University.

¹ And the numbers were all negative.

It's true, I *did* write a couple of footnoted stories about the legal academy,² but they were serious examinations of the academic workplace.³ I wasn't ridiculing my steamed colleagues,⁴ and I'm hardly the first person to poke fun at professorial non-work habits.⁵ Why didn't Cuthbert condemn Kingsley Amis?⁶

I just get this urge to write "sheepdip handouts";⁷ I can't help myself. I'm a writer, a "comma artist,"⁸ and it's not as though my storytelling is making me rich.⁹

I have a right to write. I've lived in the U.S. all my life and, if Exxon is a "person," I certainly am. No one should violate "the right of a native person to tell [his] story in [his] own

way."¹⁰

But after the memo circulated, the faculty (minus one) decided to hold a public forum at which my heresy could be discussed in a properly academic way.

"I'd cut off his ****," Professor Gabriella (Gabby) Hayes told the audience that overflowed Siwash classroom A, "after providing full due process, and then make him into processed cheese." She had begun her speech by saying she would take the high road, but she obviously got off at Exit 1.¹¹

"Tenure doesn't protect such nonsense," roared Katherine Kudzu, the Lawn Turf Professor of Law.¹² "What does this stuff have to do with scholarship? Scholarship is what my

² "Have you ever thought what slow work it must be getting even half a page of footnotes set up?" Kingsley Amis, *LUCKY JIM* 193 (Penguin Books 1961). And every law-review page has to be at least half footnotes; it's a rule.

³ And my other important work continues. Two volumes of *Tushingham on Roofs* have now been published, to positive reviews (except that one caustic critic said I spend too much time on gutter issues). By the time I've finished volume six, I should have covered everything; I've been so busy I haven't had time for a leak.

⁴ See P.J. O'Rourke, *EAT THE RICH* at xv (1998) ("[W]ho ever heard of humor with footnotes?").

⁵ The culture affects students as well. See Scott Turow, *THE LAWS OF OUR FATHERS* 173 (1996) (Hobie "chose law school ... because he'd heard the only required work was a single exam in each course").

⁶ See Paul Fussell, *THE ANTI-EGOTIST: KINGSLEY AMIS, MAN OF LETTERS* 53 (1994) (noting "the sort of thought and behavior not just found at but apparently encouraged at a university: laziness, vanity, cultural and intellectual affectation, self-absorption, and sycophancy").

⁷ *Id.* at 46 (quoting Amis: "Any proper writer ought to be able to write anything, from an Easter Day sermon to a sheepdip handout.").

⁸ No, no, no, not a friend of Alger Hiss's. See Malcolm Bradbury, *WHO DO YOU THINK YOU ARE?* 129 (Penguin Books 1993) ("This kid is a comma artist. I know it doesn't sound much, with the world the way it is, ... but those are real good commas.").

⁹ But I do get paid for this, don't I, editors? As Dr. Johnson said, "No man but a blockhead ever wrote, except for money." Quoted in *THE OXFORD BOOK OF MONEY* at xi (Kevin Jackson ed., 1995) [hereinafter *OXFORD BOOK*]. Oh, if it helps on the compensation issue, I could throw in the following: "I know chaps ... think an editor's job all beer and skittles; it's very far from being that, believe me." Amis, *supra* note 2, at 193.

¹⁰ Robin Wilson, *A Challenge to the Veracity of a Multicultural Icon*, *CHRON. HIGHER EDUC.*, Jan. 15, 1999, at A14, A15 (quoting common reaction to finding that Rigoberta Menchú made up her story).

¹¹ Academic behavior is the result of evolution. "For the better part of a century, we have been selecting for certain kinds of alienation and aggression on campus." David Damrosch, *WE SCHOLARS: CHANGING THE CULTURE OF THE UNIVERSITY* 9 (1995); see also *id.* at 78 ("[T]he university is a home for perturbed souls ...").

¹² See Amis, *supra* note 2, at 229 ("There could be no doubt about it; this article was either a close paraphrase or a translation of Dixon's own original article. ... So that was how people got chairs, was it?").

friend Vaclav Moot at Scoff Law School does¹³ – richly nuanced studies of grazing law. He's the top man in his field."¹⁴

"Indeed. Tushingam wouldn't be able to recognize a scholarly work if he made a wrong turn and accidentally wound up in the library," said Professor Rupert (the Mind) Cadwalader. "My treatise, *Evidentiary Use of Fingernail Clippings*, is the model for cutting edge scholarship."

"Nobody outside a madhouse ... could take seriously a single phrase of this conjectural, nugatory, deluded, tedious rubbish,"¹⁵ concluded Dean Deluca for the prosecution, as he put his pompoms down.

I wasn't sure that the dean's comments were precisely on point; he didn't deal with the reception of my articles *inside* the law school. But I didn't get the chance to make my case. I had been allotted time to respond but, when I started speaking, the fire alarm rang and the room cleared out.

Anyway, with the handwriting on the wall – Fire the Bum! read one of the nicer postings in the faculty lounge – I had to get out of Siwash. When things aren't going well, what better way out than becoming a dean?



I know that everyone doesn't have a high opinion of deans,¹⁶ but I do. Being a dean gives one the opportunity to shape legal education, to help mold the minds of the next generation of lawyers, to ... well, to get paid a lot more than anyone else in the building.

Besides, many schools are desperate to find a dean.¹⁷ If you can demonstrate that you won't barf on the shoes of major donors – at least not on a regular basis – you've got a shot at the job. And that's a lot better than being shot on the job, which was nearly my situation at Siwash.

The dean search process is serious – I grew a beard to look suitably academic¹⁸ – but it can also be fun. I met with quite a few search committees at the AALS convention in Key Biscayne in January. The Flyby U. people heard from the Upper Volta State folks that I was in the market, and they passed the word on to the Albuquerque Law committee. And so on. I wound up on everyone's list, and endless pina colodas and intense academic discussions¹⁹ are a nice mix.

If I wanted, I could be interviewing for deanships the rest of my life. Once your name gets into the pool of potential deans,²⁰ no life-guard could pull it out.

The deanship interviews themselves were predictable.

13 Not Ignatius Moot. A professor at an obscure midwestern law school has appropriated my characters and law school names in some of his works, and he's butchered the names. See, e.g., Arthur Austin, *THE EMPIRE STRIKES BACK: OUTSIDERS AND THE STRUGGLE OVER LEGAL EDUCATION* 33 (1998). This guy obviously wants to piggyback on my reputation.

14 Grazing law provides something to chew on for a lot of specialists. See *id.* at 153 ("Grazing law people read grazing law articles.").

15 Amis, *supra* note 2, at 226.

16 See Richard Russo, *STRAIGHT MAN* 242 (1997) ("There are lots of dull teachers. You can't make them all deans."); *id.* at 246 ("He's been a reasonably well-intentioned, lazy, honorable, mildly incompetent dean, and that's about the best you can hope for.").

17 How often can you find yours?

18 "Exaggerated facial hair probably serves several adaptive functions. As a social organ it inflates apparent body size, thereby helping to establish and maintain the group dominance hierarchy." Jerry N. McDonald, *NORTH AMERICAN BISON: THEIR CLASSIFICATION AND EVOLUTION*, caption to plate 28 (1981).

19 I also visited Clown College, where the academic discussions are always in tents.

20 By "potential deans," I mean people who might want to become a dean. I therefore exclude from the definition those actually occupying a dean's office today. By which I mean someone with the title of

"We want our dean to be outgoing," said the chair of just about every school's search committee.²¹

"We want to make a Quantum leap in reputation." (Quantum U. is the other law school in the state.)

"We want to be better-endowed."²²

That's about it. Maybe a little talk about academic philosophy or something, but nobody takes that stuff seriously.

Colleagues at Siwash supported me in my search. For the last five years or so, Cuthbert had been recommending me every time he saw an announcement of a decanal opening. He could say, quite honestly, that "there's no one I'd rather see as dean of [fill in the school]."²³ And Kudzu told callers I'd be great at fundraising. In fact, she'd pay to see me go.

I got lots of callbacks, and I wound up covering more of the Great Plains in winter than the buffalo used to.²⁴ I visited so many schools that it's all a blur to me now (probably because of the whiteouts).

It could have been hard to narrow the choices down,²⁵ but Fate intervened and made

everything easy. In late March I met with President Fate of South Soybean State University. Soso State is a school at just the right level for me.²⁶

The president and I were sitting on a leather couch in his office, "as close to the heart of civilization as you can get without going to a better school."²⁷ When the president asked if I wanted to assume the deanship, I thought he wanted to engage in a thought experiment. I'm willing to assume almost anything.

But, no, he offered me the Soso job, and I accepted on the spot.²⁸ The fit was nearly perfect, and I was sure I could make any necessary alterations.

Soso State Law School was now my baby,²⁹ waiting to be crafted in my image. Both of us needed a facelift, and a little belt-tightening wouldn't have hurt either.

When I arrived at Soso in June, there was much to be done. After having the blackboards cleaned – I wanted to start with a clean slate – I faced some serious issues. My first major policy decision was to take down the portraits of my predecessors that had been

dean today, whether or not he or she is actually in the office today. By "today," I mean as I say this, regardless of when you read this. Gee, this is hard. I now understand why it's impossible to commit perjury. See Francis X. Clines, *The Testing of a President: The Deposition*, N.Y. TIMES, Sept. 22, 1998, at A1 (quoting POTUS: "It depends on what the meaning of the word 'is' means.").

21 Sure enough, many of the deans they hired were gone within a year. See Cynthia Cotts, *No Good Dean Goes Unpunished*, NAT'L L.J., May 11, 1998, at A1.

22 You know what they meant. Larry Flynt may now be our national ethicist, but get *your* mind out of the gutter. See *supra* note 3.

23 See Amis, *supra* note 2, at 228 ("He would finish what testimonials he could for any application Dixon might make for a new job, provided it were outside the city.").

24 And will again! See Doug Peacock, Preface in Douglas Gruenau, *BISON: DISTANT THUNDER* 8-9 (1995) (defending the proposition that "Buffalo have power").

25 See Fussell, *supra* note 6, at 55 (describing school where "nothing of interest takes place ..., ever took place, or ever could take place"). Try to get narrower than that.

26 "So so' is good, very good, very excellent good: and yet it is not; it is but so so." William Shakespeare, *AS YOU LIKE IT*, act V, sc. 1.

27 Russo, *supra* note 16, at 160.

28 I didn't want him to see that I'd spilled my drink on the couch.

29 See J.C. Gray, *Cases and Treatises*, 22 AM. L. REV. 756, 763 (1888) ("The greatest teacher the world has ever known was fond of comparing himself to a midwife. His task, he said, was to aid the scholar to bring forth his own ideas. He, to-day, will be the most successful teacher who can best exercise this obstetrical function.").

hanging in the law school halls. (The portraits were hanging, not my predecessors, although there's a lot to be said for stringing up the simpering bastards.) As far as I'm concerned, it's just as if old Dean Gradgrind had never been here.³⁰

But of course a dean can't really change anything important, except light bulbs,³¹ so what I had to do was make it look like I had.³²

We had a faculty retreat so I could get to know my new colleagues better.³³ The level of discourse was high; we met on the fifteenth floor of the Soso administration building.

The faculty agreed that we needed to create a niche for the law school. (Actually, we couldn't agree at first on how to pronounce "niche," but after a morning's discussion we came to nearly unanimous agreement on that issue.)

We decided that we should build on our strengths and promote empirical legal research. I was sure I could find outside funding to create a Soso Center for the New Empirics,

and I hoped to raise enough to bring the Center indoors, at least on cold days. If necessary, I could divert money from other sources – for example, by chopping the budget for trivial studies, like those in taxation.³⁴

The empirical work-product of my new colleagues was fantastic, and getting better every day. We prepared a brochure noting our accomplishments to send to all law professors in the western hemisphere. You'll have to imagine the bright-red, glossy paper, and the illustrations of English academic buildings, but here are some of the highlights of our works-in-progress:

- Professor Donner's empirical work on the ubiquity of Christmas tree needles³⁵
- Professor Sanders' study of the danger that the spread of Chinese restaurants poses to the American chicken population³⁶

30 See David King, *THE COMMISSAR VANISHES: THE FALSIFICATION OF PHOTOGRAPHS AND ART IN STALIN'S RUSSIA* (1997); cf. Auberon Waugh, *Way of the World*, *DAILY TELEGRAPH*, Jan. 2, 1999, at 25 (discussing University of Edinburgh's removal of bust of Arthur Koestler when female students "complained of 'feeling uneasy under its gaze,'" even though the bust had "been standing on the site for ten years without attacking or abusing anyone").

31 And if you've ever been to a faculty or student bar association meeting, you know that light bulbs are very important, at least for the two hours a week that students and faculty are actually in the building.

32 See Fussell, *supra* note 6, at 55 ("[B]ecause there isn't enough real intellect or curiosity to go around, obviously its presence must very often be faked.").

33 The faculty was enthusiastic. See Paul Fussell, *BAD: OR, THE DUMBING OF AMERICA* 99 (1991) ("[I]t's no wonder that the idea of conferences and learned group occasions flourishes [among academics]: what better way to prevent the hard work of solitary reading, thinking, and writing?").

34 The government doesn't need the money; "the Constitution was paid for long ago." George S. Kaufman & Moss Hart, *YOU CAN'T TAKE IT WITH YOU* (1936), quoted in *OXFORD BOOK*, *supra* note 9, at 94.

35 Where do those things come from months after a tree has been taken down? One of Donner's findings is that the presence of needles is correlated with the presence of mothers-in-law (MILs, to use the technical term), but random checks of visiting MILs showed that, in general, visiting MILs didn't bring the needles with them to drop at inopportune times. Donner therefore hypothesizes that spontaneous generation might be involved. If further research supports that hypothesis, colonies of MILs might be established in the Amazon basin to help recreate the rain forests.

36 This article will surely move us up the pecking order. An excerpt:

In 1988 Wong and Wong noted a concentration of four Chinese restaurants per square block in American metropolitan areas – a figure that represented a doubling in ten years. Perdue later concluded that in the main the two Wongs were right, but they had *underestimated* the

- Professor Clinton's seminal work³⁷ on law-review rejection letters, "I Hear America Dinging"
- Several colleagues' interdisciplinary research on the understudied effect of parrot couplings on American society³⁸

It may not all be law, but it's not not law.



That was four years ago, and, if anything, we've been doing even better work as my deanship has unfolded.

Don't misunderstand; we aren't just ivory-tower empiricists. Some of this work has important policy implications. For example, Professor Clinton comes out strongly in favor of honest rejection letters, which would replace the mealymouthed forms now used by most law reviews. What a refreshing change: "Unfortunately we cannot publish all the fine manuscripts we receive. We also cannot publish yours."

Of course,³⁹ Soso faculty do the usual

"thought pieces," too. Professor Dior has written the definitive call for a national law school dress code (the Uniform Uniform Code, she calls it).⁴⁰ And Professor Walker's monumental article on comparative jaywalking law is the first step on a new path for the school. Walker hated my predecessor, whose name I've forgotten, because the dean criticized Walker's placement of the article in a pedestrian law review. But I didn't want Walker to take a hike; I gave him the green light to go ahead with further boundary-crossing work.

Whatever goes on at other schools, the suggestion that *my* faculty is made up of shirkers is offensive.⁴¹ We convey knowledge. It's just that sometimes we do it in ways that are hard to find on Lexis or in libraries: "many of my colleagues have always refused to publish books, naturally preferring to transfer their thoughts by word of mouth to the two or three people who are fit to understand them."⁴² And we're on the brink of a major discovery: Professor Zenger's work on his "encrypted" article will, I hope, come to fruition soon. It may even allow us to break several codes, and find twenty years' worth of hidden scholarship by several other faculty

rate of restaurant spread. If the current rate continues, Ehrlich determined that the United States will have three Chinese restaurants per capita by 2010. One can foresee the day on which the last chicken lays down her life for moo goo gai pan.

³⁷ See *supra* note 22.

³⁸ See John Sparks & Tony Soper, *PARROTS: A NATURAL HISTORY* ch. 3 (1990) (entitled "Parrot Sex and Society"). You'll be amazed to learn what "Polly wants a cracker" really means. Chapter 9, "Parrots for Pleasure," has a disgusting ... Well, you don't want to know. Or do you?

³⁹ See Amis, *supra* note 2, at 223 ("In an effort to make his script sound spontaneous, he'd inserted an 'of course' here, a 'you see' there, an 'as you might call it' somewhere else ...").

⁴⁰ The jeans pool at Soso was overflowing, and "[t]here is something about the combination of denim and tenure that is inherently preposterous." Roger Kimball, *Whose Enlightenment is It?*, *NEW CRITERION*, Apr. 1996, at 4, 5.

⁴¹ See, e.g., Austin, *supra* note 13, at 35 ("To Snopes, it's better not to do anything than to sink into the sewer of ignominious incrementalism."); *id.* at 58 ("[T]he illusion of hard work and grand scholarship is confirmed by not getting the article published.").

⁴² Malcolm Bradbury, *CUTS* 54 (Penguin Books 1994); see also Turow, *supra* note 5, at 241 (noting name of gang leader, which, like some scholarship, "does not have a parallel existence in the world of letters - it's like some subatomic particle that exists only in physicists' calculations").

members.⁴³ Sure, there are a few problem children on the faculty, but I can take care of them. I'm a dean; I've got my rehabilitation projects going.⁴⁴

I'm sure you're impressed by the strides we've taken in our scholarship, but let no one think that our emphasis on research comes at the expense of teaching. We play Mozart in all the classrooms, to maximize receptivity to learning, and the faculty is full of great pedagogues who have mastered the Socratic dialog.⁴⁵ (Or is it pedagogs and dialogue? Who can remember these things?) We keep our students focused on the important issues, rather than the tangential matters that can eat up time and intellectual energy.⁴⁶ Finally, fulfilling what is perhaps our most important pedagogical function, we serve as models for our students.⁴⁷

As a law school of the 90s, soon to be a law school of the 00s (Y2K Gods willing), we have also implemented the now-mandatory skills instruction, at the new Soso Center for the Performing Arts. Our trial practice students will never forget Professor Baryshnikov's most fundamental rule: "If you fall asleep at the counsel table, the first thing you say when you wake up is, 'I object!'"⁴⁸

Students are as happy as clams, which is to

say as happy as the faculty, particularly after we jettisoned the grading system. We *listen* to our students (except during some of Mozart's more bombastic passages), and we responded to their reasonable complaint that grades are repressive. As Professor Scarlett noted, to student acclaim, "Take Hester Prynne. She got an A, and look what happened to her."⁴⁹



So things are going well; Soso has entered an era of good feeling. We have become a close knit community, with a faculty Weaving Committee that is, as far as I know, unique to legal education. With it we are now able to tie up loose ends; I do so myself. I hope any day now – or at least before I retire – to meet Professors Geist and Caspar, valued members of our faculty, who have been out each time I've tried to see them over the last four years. Geist's secretary regularly tells me to "[c]ome back another day, when once more he's not here."⁵⁰ Reflecting the high value Soso places on truth, she's been right every time.

In sum, there is much to be done to prepare our students for the challenges of legal prac-

43 See *Secret Messages*, A.B.A. J., Jan. 1999, at 78 (noting effect of federal regulations governing export of encryption software on, among other things, ability to complete law review articles).

44 But see Austin, *supra* note 13, at 59 ("I know someone who has been rehabilitated three times.").

45 See *id.* at 28 ("He knows he can go to class cold and then put the burden on the students.").

46 See Amis, *supra* note 2, at 28-29 ("One of the things he knew, or seemed to, was what scholasticism was. Dixon read, heard, and even used the word a dozen times a day without knowing, though he seemed to. But he saw clearly that he wouldn't be able to go on seeming to know the meaning of this and a hundred such words while [earnest student] Michie was there questioning, discussing, and arguing about them.").

47 See Randall Jarrell, *PICTURES FROM AN INSTITUTION* 90 (1952) ("Miss Batterson was only of little value to the students she taught, and that mainly in the *go thou and do otherwise* way in which teachers most often are ...").


48 Jonathan Harr, *A CIVIL ACTION* 88 (1995). It works – sometimes. But see *id.* at 324-25.

49 Bradbury, *supra* note 8, at 135.

50 *Id.* at 143; see also Amis, *supra* note 2, at 92 ("Welch was known to be taking the whole day off, as distinct from days like yesterday ... when Welch merely took the early and late morning and the afternoon off.").

tice in the twenty-first century. We must

Forgive me. I started to lapse into my stock alumni speech, and you don't need to hear that. Anyway, it will be published in an upcoming issue of the *Journal of Legal Education*, between two articles on Siberian feminist theory.⁵¹ You can read it there.

You know, this deaning thing makes for a pretty good life. 

⁵¹ I know the *Green Bag's* rule is only 50 footnotes, but I have a couple more points to make. First,